Supreme Court, U.S.
FILED
OCT 31 1994
OFFICE OF THE CLERK

No. 94-590

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J,

Petitioner,

v.

WAYNE and JUDY ACTON, guardians ad litem for James Acton,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Thomas M. Christ
ACLU Foundation of Oregon, Inc.
101 S.W. Main, Suite 2000
Portland, OR 97204
(503) 221-1011

Counsel of Record for Respondents

QUESTION PRESENTED

Does petitioner's drug testing program constitute an unreasonable search under Article I, section 9, of the Oregon Constitution?

CONTENTS

I. Opinions Below 1

II. Jurisdiction 2

III. Constitutional Provisions 3

IV. Statement of the Case 4

V. Reasons for Denying Certiorari . 21

1. No Federal Question 21

2. Risk of Advisory Opinion . . 22

3. No Conflict among the Circuits 28

4. Inadequate Record 36

5. Issue Unlikely to Recur . . . 37

6. Issue not Ripe for Review . . 39

7. No Role for the Court to Play 40

8. Issue Already Decided 42

VI. Conclusion 45

AUTHORITIES

Cases

AFGE, Local 1533 v. Cheney, 944 F.2d 503 (9th Cir. 1991) 34

Acton v. Vernonia School District 47J, 796 F.Supp. 1354 (D. Or. 1992) 1-2

Acton v. Vernonia School District 47J, 23 F.3d 1514 (9th Cir. 1994) . . . . passim

Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990), *cert. denied* 498 U.S. 1083 (1991) 33

Guiney v. Roache, 873 F.2d 1557 (1st Cir. 1989) 33-34

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) 27

IBEW, Local 1245 v. Skinner, 913 F.2d 1454 (9th Cir. 1990) 33

IBEW, Local 1245 v. U.S. NRC, 966 F.2d 521 (9th Cir. 1992) 33

International Brotherhood of Teamsters v. Dept. of Transp., 932 F.2d 1292 (9th Cir. 1991) . 33

Kentucky v. Stincer, 482 U.S. 730 (1987) 24

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 29, 30-33, 35, 40-43

New Jersey v. TLO, 469 U.S. 325 (1985) 42-43

Oliver v. United States, 466 U.S. 170 (1984) 26-27

Richards v. United States, 369 U.S. 1 (1962) 22

Ross v. Moffitt, 417 U.S. 600 (1974) 40

Schaill by Kross v. Tippecanoe County Sch. Corp., 864 F.2d 1309 (7th Cir. 1988) 28-29, 31, 35, 37, 39

Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989) 29-30, 32, 33, 40-43

State v. Campbell, 306 Or. 157, 759 P.2d 1040 (1988) 26

State v. Caraher, 293 Or. 741, 653 P.2d 942 (1982) 25

State v. Dixson/Digby, 307 Or. 195, 766 P.2d 1015 (1988) 27

State v. Hoskinson, 320 Or. 83, ___ P.2d ___ (1994) 26

State v. Tourtillott, 289 Or. 845, 854, 618 P.2d 423, 427 (1980), cert. denied, 451 US 972 (1981) 14

Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1988) 33

Statutes

28 U.S.C. 1254(1) 3

Constitutional Provisions

Oregon Constitution, Article I, section 9 . . . . passim

United States Constitution, Fourth Amendment . . . . . passim

I.

OPINIONS BELOW

Respondents Wayne and Judy Acton (the Actons), guardians ad litem for their son, James Acton, 12, brought this action to enjoin petitioner Vernonia School District 47J (the District) from enforcing a random drug testing program for student athletes. They alleged that the program offends Article I, section 9, of the Oregon Constitution, as well as the Fourth Amendment to the United States Constitution, both of which prohibit "unreasonable searches." The District Court found no violation of either constitution and entered judgment against the Actons. *Acton v. Vernonia School*

District 47J, 796 F.Supp. 1354 (D. Or. 1992) (Pet. App. B at 76a). They appealed, and the Court of Appeals reversed. *Acton v. Vernonia School District 47J*, 23 F.3d 1514 (9th Cir. 1994) (Pet. App. A at 1a). The appeals court ruled for the Actons on their state claim and, therefore, found it unnecessary decide their federal claim. *Id.* at 1518 (Pet. App. A. at 16a) ("We are therefore constrained, in the first instance, to decide this case on Oregon constitutional grounds.").

II.

JURISDICTION

The petition for writ of certiorari was filed on September 28, 1994, within 90 days of the denial of the District's timely petition for rehearing (July 8,

1994). (Pet. App. C at 143a). This court has jurisdiction under 28 U.S.C. 1254(1).

III.

PERTINENT CONSTITUTIONAL PROVISIONS

Article I, section 9, of the Oregon Constitution reads:

> "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

The Fourth Amendment to the United States Constitution reads:

> "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched,

and the persons or things to be seized."

IV.

STATEMENT OF THE CASE

The District's statement of the case contains several misstatements, which, as explained later, may bear on what issues would be before the Court if it grants certiorari. The Actons bring them to the Court's attention pursuant to Rule 15.1.[1]

First Misstatement: *There was an "epidemic of drug use" among the District's students before the drug testing policy.* (Pet. at 3).

[1] Curiously, most of the "facts" in the District's statement of the case are drawn not from the evidence but rather from the District Court's opinion, which the Court of Appeals overturned. Pet. at 4 n. 1. As discussed more fully below, there is little or no evidence to support the District Court's findings about drug use by District students.

In fact, the record contains little or no evidence that any students were using drugs. What it contains is mostly complaints by some teachers about a perceived decline in student deportment before the policy was adopted. Students, the teachers said, were becoming increasingly unruly, disruptive, and insubordinate in the classroom, leading to a perceived (but never proven) rise in the number of students that teachers sent to administrators to be disciplined for misbehaving, commonly known as "disciplinary referrals." For want of some other explanation for the change in student conduct, the teachers assumed that the unruly students must be on drugs. This assumption was supported, in the teachers' minds, by unconfirmed, second-hand reports of off-campus drug

use, almost all of it hearsay or hearsay within hearsay,[2] and by reports of students romanticizing drugs in papers and hallway conversations.[3]

---

[2] For example, the school principal testified: "Four football players talked to the football coach and admitted that they have used drugs, and amphetamines were those drugs, and the coach told me[.] [T]he kids never came forward and said, you know, they did. . . ." Tr. 24. In other words, four students told the football coach that they had used amphetamines. The coach told principal what he had heard, and the principal repeated it at trial. Later, the principal admitted that he had never actually caught a student taking drugs and that he was acting solely on hearsay reports. Tr. 57.

The wrestling coach also testified: "When I was an assistant coach the head football coach was called in and I believe it was in the football season of '85 and apprised of the fact that parents called and said that some of their sons -- that other kids on the team had done drugs on a road trip. . . ." Tr. 104. Translated, what the wrestling coach said is that the football coach told him that some parents told the football coach that some students told the parents that some other students had taken drugs during a road trip.

The district court recognized that the District's case was built on hearsay, Tr. 143-44, and allowed the Actons a continuing objection on that grounds. Tr. 24. The court also said, twice, that it would not rely on hearsay to find that students were actually taking drugs, Tr. 25, 116-17, but eventually it did just that.

[3] A teacher who taught composition to 90 or so students each year for 13 years testified that 8 or 9 of them -- which works out to less than one percent of all of her students -- had written papers that romanticized drugs. Tr. 88, 91, 98. There is no evidence that any of those students, or others who were overheard in the hallway bragging about drug use, actually took drugs, or that this was anything but juvenile bravado.

Some teachers testified that an unspecified group of students took to calling themselves the "Big Elks," for some unknown reason. Tr. 68-69, 81, 128-31. They went around the school "bugling" and butting their heads together, again for unknown reasons. Tr. 91. Another group called itself the "Drug Cartel" and did equally strange things. Tr. 91. As usual, school officials assumed that all strange behavior must be drug-induced, not simply juvenile, and thus concluded that these two cliques were part of some underground drug culture. Pet. at 7 n. 4. There is no evidence, however, that any "Elk" or "Cartellian" actually took drugs.

Clearly, the teachers *thought* they had a drug "problem," which, of course, is a "matter of perception or definition," as the Court of Appeals noted. 23 F.3d at 1519 (Pet. App. A at 20a). But they never came close to proving that they actually *had* a drug problem, certainly not one of "epidemic" proportions, as the District suggests in its petition.

Second Misstatement: *Drug use "invaded the [District's] sports*

program," endangering the athletes. (Pet. 7).

If there is little evidence of drug use in the classroom, there is no evidence of drug use in the sports program. Indeed, the District conceded, in a pre-trial interrogatory, *that it was unable to confirm even one drug-related injury in the entire history of its sports program.* Ex. 4. The District "suspects" that one athlete may have been injured while competing on drugs, but that suspicion is based on evidence so skimpy it barely passes the straight-face test.[4] There simply is no tenable

[4] The wrestling coach testified that a high school student was injured in an "away" match when he failed to react quickly to a hold his opponent put on him. Tr. 110-11. *The next day* the coach went to the hotel room the wrestler was sharing with *three* other students. While there the coach smelled what he believed to be marijuana and concluded that "somebody in the room was smoking." Tr. 111-12. Of course, that "somebody" was not necessarily the injured wrestler, and even if it was him, it does not follow that he had also smoked marijuana before the match the day before. The coach was the first to admit that this evidence leads nowhere: "There was no way of particularly proving at that point in time whether he was under the influence [during the match]." Tr. 112.

evidence of any student ever competing in a District-sponsored athletic event while under the influence of illegal drugs.[5]

Third Misstatement: *The drug testing policy "accomplished its goal."* (Pet. at 13-14).

The goal of the policy was to keep student athletes from competing while under the influence of drugs and thus to prevent athletic injuries. But since there is no evidence that any students were in fact taking drugs and then competing, and since there were as many

[5] The Court may be as baffled as the Actons by the District's assertions that (1) drug use was rampant in its sports program and (2) drug-affected athletes present a grave risk of harm to themselves and their opponents, when the District admits that there have been no confirmed drug-related athletic injuries in the history of its sports program. That admission appears to disprove at least one of those assertions, if not both of them.

drug-related athletic injuries before the policy took effect as after -- to wit, none -- it is impossible to conclude that the policy accomplished anything except an invasion of student privacy.

It is true that some teachers noted an improvement in classroom behavior after the policy was adopted, but that wasn't the goal of the policy -- at least not the stated goal.[6] Moreover, since there is no basis for finding that the previously unruly students were unruly because of drugs, there is no basis for concluding that the policy had anything to do with the turnaround in their

[6] As discussed below, the policy originally applied to all extracurricular activities, athletic and nonathletic, Tr. 45-46; Ex. 5 at 16, and thus affected almost every student in the district. Later, the District limited the policy to extracurricular athletics. Tr. 45-46. Even with that limitation, the policy still affected over half of the student body. Tr. 20, 58; Ex 5 at 5.

behavior. The policy could not alter a condition that did not exist.[7]

Even if classroom deportment was entirely drug-driven, and even if the improvement in deportment was due solely to a decline in drug use -- big ifs on this record -- it still cannot be asserted, without resort to guesswork and speculation, that the decline in drug use was due to drug testing, rather than to the District's other drug eradication programs.

The District's own expert, Dr. DuPont, testified that drug use among high school students has declined steadily, both statewide and nationwide, since the mid-1980s, which includes the

[7] A school principal testified that it seemed to him that the number of disciplinary referrals rose before the policy was adopted and declined afterwards. Tr. 21, 43-44. But he provided no statistics to back this up. Moreover, there is no evidence that any of the referrals, before or after, were for illicit drug use.

period of time when the District's drug testing policy was in force. Ex. 106 at 13-15, 74; *see also* Tr. 45 and Ex. 106. Whatever caused this trend -- Dr. DuPont attributes it to decreasing societal tolerance of drugs and widespread publicity over the drug-related deaths of Len Bias and other prominent athletes -- may also account for the trend observed in Vernonia (if in fact there was a trend there).

Fourth Misstatement: *The Ninth Circuit held that the District's drug testing policy violates the Fourth Amendment.* Pet. at 17.

It is sometimes hard to tell whether a case has been decided on state or federal grounds where, as here, the complaint includes both state and federal

claims. In this case, however, the Ninth Circuit took care to explain that it was ruling for the Actons on their *state* constitutional claim, "in order to avoid addressing federal constitutional claims unnecessarily." 23 F.3d at 1518 (Pet. App. A at 12a-13a). At the outset of its opinion, the court said: "Before turning to a discussion of the substantive issues, we must address the somewhat arcane question of whether we should decide this case on the basis of the Oregon Constitution or on the basis of the United States Constitution." *Id.* (Pet. App. A at 12a). The court then noted that, although Article I, section 9, and the Fourth Amendment are worded almost exactly the same, Oregon nonetheless "insists that its constitutional provision can give more

protection than the federal constitution and that it sometimes does so." *Id.* (Pet. App. A at 13a-14a) (citing cases). "Furthermore," the court said, "Oregon courts, or judges on those courts, have gone out of their way to insist that the federal constitutional analysis does not control Oregon search and seizure analysis." *Id.* (Pet. App. A at 15a) (again citing cases).[8] The court concluded, therefore, that it was "constrained, in the first instance, to decide this case on Oregon constitutional grounds." *Id.* (Pet. App. A at 16a).

The court then proceeded with a lengthy discussion of Article I, section 9, and the Oregon cases

---

[8] In one of the cited case, *State v. Tourtillott*, 289 Or. 845, 854, 618 P.2d 423, 427 (1980), *cert. denied*, 451 US 972 (1981), the Oregon Supreme Court said that it would apply "the Fourth Amendment analyses" of the United States Supreme Court, "although we are at liberty to adopt a stricter test under our own constitution."

construing it, which establish a three-part test for deciding Article I, section 9, search cases: (1) Was there a search? (2) Did the officials conducting the search have authority to do so? and (3) Was the search reasonable? *Id.* at 1519 et seq. (Pet. App. A at 22a et seq.). To the extent that Oregon precedents left some holes in the analysis, the court looked for guidance to federal caselaw. But the federal citations do not change the fact that what the court was deciding -- and all that it was deciding -- was whether the District's drug testing policy complied with the Oregon Constitution. That is why Judge Reinhardt felt compelled to write a concurring opinion in which he expressed his view that the majority opinion decided the case on both the

state claim and the federal claim. 23 F.3d at 1527 (Pet. App. A at 65a).

Omitted Facts: The District's statement of the case does not fully describe its drug testing policy.

As first enacted, the policy applied to any student who wished to participate in any extracurricular activity, athletic or nonathletic, including, for examples, band, drama, and student government. Tr. 45-46; Exh. at 15-16. Later, concerned that it might be overreaching, the school board limited the policy to athletics. Tr. 46-47.

As amended, the policy provides that no student at any level -- first grade through twelfth -- may participate in a district-sponsored athletic program

unless he consents, through his parent or guardian, to have his urine tested for certain illicit drugs at the start of the program, and also consents to random testing during the course of the program. Exh. 1. The drugs for which the district tests are cocaine, marijuana, amphetamines, and, occasionally, LSD. Exh. 4 at 4-5; Exh. 5 at 15, 17, and 24. Notably absent from this list is the most commonly abused drug -- alcohol. Id.[9] Also excluded are steroids or other performance-enhancing substances. Id.

Every athlete is tested at least once each year, at the start of the first athletic season in which he competes. Exh. 4 at 1; Exh. 5 at 21. Thus, if a student tries out for football or cross country, he will be tested in the fall.

---

[9] The District Court erred when it said the District tests for alcohol. Pet. App. B at 92a.

If he skips fall and winter sports in favor of track or golf, he will be tested in the spring.

Student athletes are also subject to random tests, conducted weekly during each athletic season. Their names are written on separate pieces of paper and placed together in a box. A student is then selected to draw several names from the box while two teachers watch. The students whose names are drawn are notified and tested that same day; some are even called from class for testing. Afterwards their names go back in the box. Tr. 47-48; Exh. 4 at 3. There is no guarantee that any given student will ever be selected for random testing. On the other hand, there is no guarantee that any given student will not be

selected each week of every season in which he or she competes. Exh. 5 at 21.

The method of testing depends on the sex of the student. Boys are taken to the locker room, where, one at a time, they urinate into a vial while a male teacher watches and listens close behind. Tr. 38-41, 121-127; Exh. 4 at 4; Exh. 5 at 21-22. Girls produce their samples in an enclosed stall while a female teacher stands outside listening for the normal sounds of urination through a vent in the door. Tr. 72-75, 78-79; Exh. 4 at 4; Exh. 5 at 21-22.

Any student who refuses to be tested, as James Acton did, is automatically suspended from the sports program for the remainder of the athletic season. Exh. 1 at 1. If a student flunks the test -- that is, if his urine

tests "positive" for the presence of the target drugs -- he will be disciplined as follows. For a first "offense" the student will be given a choice between "[p]anticipating in an assistance program and taking weekly drug tests for six weeks" or "be[ing] suspended from participating in athletics for the remainder of the current season and the next season for which he/she is eligible." Id. at 2. For a second "offense" the first option is removed; the student is suspended for the remainder of the current season and all of the next season. Id. A third "offense" results in suspension through the next two seasons. Id.[10]

[10] At trial, Randy Aultman, the principal of James's grade school, was confused about the exact terms of the policy. He testified that a student who commits a second "offense" may continue participating in athletics if he submits to weekly counseling and drug testing. Tr. 51-53. The written policy -- which is alleged in the complaint and admitted in the answer -- clearly provides that a second "offense" results in an automatic suspension.

In the three and one-half years of testing before the trial in this case, only two students, both in high school, tested "positive." Tr. 64; Exh. 5 at 24.

V.

REASONS FOR DENYING CERTIORARI

There are several reasons to deny certiorari. Here are the main ones:

1. No Federal Question

The Court of Appeals decided this case under state law, not federal. It held that the District's drug testing policy violates Article I, section 9, of the Oregon Constitution. In deciding what Article I, section 9, requires, the court referred, at times, to Fourth Amendment cases, believing the Oregon

Supreme Court would do the same, since there are no Oregon drug testing cases. But that does not change the fact that what the Court of Appeals was doing was speculating on how the Oregon Supreme Court would decide this case under Oregon law if it had been filed in state court. This Court should not join in that speculation. Instead, it should follow its long-standing practice of deferring to the lower federal courts on issues of state law. *See, e.g., Richards v. United States*, 369 U.S. 1, 16 n. 35 (1962).

2. Risk of an Advisory Opinion

The Court of Appeals concluded that the District's drug testing policy violates the Fourth Amendment and, therefore, that it must also violate Article I, section 9, of the Oregon

Constitution, because Article I, section 9, provides at least as much protection as the Fourth Amendment, and probably more. As the court explained, "We can say with absolute confidence that the Oregon Constitution will not be construed [by Oregon courts] to offer less protection than the Fourth Amendment. [And] [i]t is highly likely that it will be found to offer more protection." 23 F.3d at 1518. That being so, a decision by this Court, whichever way it went, would not affect the judgment below. If the Court agrees that the drug testing policy violates the federal constitution that would, of course, leave the judgment intact. The result would no doubt be the same if the Court decided that the policy did *not* violate the federal constitution, because the Court

of Appeals, on remand, could still decide -- and given its view of Oregon law, probably *would* decide -- that the policy nevertheless violates the more-shielding state constitution. It follows that an opinion by this Court on the impact of the Fourth Amendment on the District's drug testing policy would probably be advisory and would not resolve this case.

The situation might be different if Oregon, like some states, construed its bill of rights to be coextensive with the federal Bill of Rights. Then, a ruling by this Court on the reach of the Fourth Amendment would decide as well the reach of Article I, section 9, and thus conclude this action. *Compare Kentucky v. Stincer*, 482 U.S. 730, 735 n. 7 (1987) (although the Kentucky Supreme Court found violations of both the Kentucky

Constitution and the Sixth Amendment, it gave no indication that respondent's rights under the former were broader than under the latter, and thus the Supreme Court's resolution of the federal claim would also decide the state claim). But, as the Ninth Circuit noted, the Oregon Supreme Court has repeatedly said that Oregon's constitutional safeguards may -- and often do -- reach farther than their federal analogues despite similarities in language.

This is especially true of Article I, section 9. The Oregon Supreme Court has regularly held that Oregon's search-and-seizure provision is not coterminous with the Fourth Amendment, and therefore is not controlled by federal caselaw. For example, in *State v. Caraher*, 293 Or. 741, 653 P.2d 942

(1982), the court abandoned Fourth Amendment jurisprudence in deciding whether a search incident to arrest was lawful under Article I, section 9. The court continues to chart its own course on that particular issue, disregarding federal precedents. *See State v. Hoskinson*, 320 Or. 83, ___ P.2d ___ (1994). In 1988, the court rejected the federal "reasonable expectation of privacy" test for determining what interests Article I, section 9, protects. *State v. Campbell*, 306 Or. 157, 759 P.2d 1040 (1988). That same year, the court declined to adopt an "open fields" exception to the warrant and suspicion requirements of Article I, section 9, similar to the exception this Court adopted for the Fourth Amendment in *Oliver v. United States*, 466 U.S. 170

(1984). *State v. Dixson/Digby*, 307 Or. 195, 766 P.2d 1015 (1988). Clearly, Oregon follows its own compass in deciding whether a government-ordered search is reasonable under the state constitution.

Years ago, Justice Jackson, writing for the Court, observed: "[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the [lower] court after we corrected its view of federal laws, our review would amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). In the case at hand, an opinion from this Court would be nothing more than advisory, because even if the Court held that the District's drug testing

policy does not offend the federal constitution, the lower court would not be compelled thereby to disturb its conclusion that the policy offends the state constitution.

3. No Conflict among the Circuits

The District suggests that the Ninth Circuit's decision in this case is in conflict with the Seventh Circuit's decision in *Schaill by Kross v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir. 1988), which involved a random drug testing program similar in some respects to the one at issue here, but also dissimilar in several other respects.[11] In fact, there is no

---

[11] The drug testing program at issue in *Schaill* was much less intrusive than the one at issue here. It did not apply to elementary school students, 864 F.2d at 1310; students were not observed while urinating, *id.* at 1311; and a student who flunked the test was not suspended from all competition, *id.* at 1311 and 1319. Moreover, in *Schaill*, unlike here, the

conflict between the cases, because, as explained above, this case was decided under the Oregon Constitution, whereas *Schaill* was decided under the federal constitution.

Moreover, *Schaill* is no longer good law. *Schaill*, decided in 1988, upheld a drug testing program for high school athletes because, the court said, the school district had a "substantial" interest in testing. 864 F.2d at 1321. But that is the wrong test. In *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), decided after *Schaill*, this Court held that the government-sponsored drug testing is constitutional if the

---

record contained substantial evidence of both drug use by athletes and drug-related athletic injuries. *Id.* at 1310 and 1320.

government has a "compelling" interest in testing. *Skinner*, 489 U.S. at 628 ("[T]he government interest in testing is compelling.") and 633 ("In view of our conclusion that, on the present record, the toxicological testing contemplated by the regulations is not an undue infringement on the justifiable expectations of privacy of covered employees, the Government's compelling interests outweigh privacy concerns."); *Von Raab*, 489 U.S. at 677 ("In sum, we believe the Government has demonstrated that its compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a

firearm.") and 679 ("We hold . . . The Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions . . . ."); *see also id.* at 668. 670 and 674. By adopting a compelling-interest standard, the Court implicitly rejected *Schaill's* substantial-interest standard.

This is not just word-play. A substantial interest is not necessarily a compelling one. A compelling-interest standard makes clear that the government must have a very good reason to subject people to such an extreme invasion of privacy as drug testing by urinalysis.

The facts of *Skinner* and *Von Raab* certainly are compelling when compared to those of *Schaill*. *Skinner* involved a drug testing program for railroad employees involved in certain types of train wrecks. The Federal Railroad Administration adopted the program after an 8-year study identified at least 45 accidents caused by drug-impaired employees, resulting in 35 fatalities, 66 non-fatal injuries, and over $28 million in property damage. 489 U.S. at 608. *Von Raab* concerned drug testing of customs employees who (1) were directly involved in the interdiction of controlled substances, (2) carried firearms, or (3) handled classified information. These employees, the Court noted, were in a position to "endanger the integrity of our Nation's borders or

the life of the citizenry." 489 U.S. at 679.

Following *Skinner* and *Von Raab* the federal appeals courts have approved drug testing programs for nuclear power plant employees, *IBEW, Local 1245 v. U.S. NRC*, 966 F.2d 521 (9th Cir. 1992); commercial truck drivers, *International Brotherhood of Teamsters v. Dept. of Transp.*, 932 F.2d 1292 (9th Cir. 1991); gas pipeline workers, *IBEW, Local 1245 v. Skinner*, 913 F.2d 1454 (9th Cir. 1990); commercial airplane pilots, mechanics, and traffic controllers, *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990), *cert. denied* 498 U.S. 1083 (1991); correctional officers with direct prisoner contact, *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1988); police officers who carry weapons, *Guiney v. Roache*, 873 F.2d 1557

(1st Cir. 1989); and government employees with access to secret or top-secret government records, *AFGE, Local 1533 v. Cheney*, 944 F.2d 503 (9th Cir. 1991). These cases make clear that the government's interest in drug testing does not rise to the level of "compelling" unless it seeks to avoid obvious and catastrophic social harm, such as a reactor meltdown, a pipeline explosion, a plane, train, or truck crash, or a breach of national security.

The Ninth Circuit took note of these precedents when it concluded, in this case, that middle and high school athletics is not sufficiently "safety-" or "security-sensitive" to justify suspicionless drug testing. The court noted that a drug-affected athlete might hurt himself or an opponent -- although

it hasn't happened yet in Vernonia. And that, the court said, would be a "tragedy." 23 F.3d at 1526. But it is not on par with the potential tragedies that have justified other drug testing programs. There is no reason to believe that the *Schaill* court, writing today, post-*Skinner* and -*Von Raab*, and applying a compelling-interest test rather than a substantial-interest test, would reach a different conclusion. There is, therefore, no actual conflict between the decision below and the decision in *Schaill*, even on the question whether the federal constitution, as opposed to the Oregon Constitution, tolerates random drug testing of schoolchildren.

4. Inadequate Record

The evidence in this case does not squarely present the issue the District wants addressed -- namely, whether suspicionless drug testing is a lawful response to "rampant" drug use in a grade school athletic program. As explained earlier, there is no evidence of drug use by student athletes in the defendant school district, let alone rampant drug use. It bears repeating that the District has conceded that it cannot confirm so much as one drug-related athletic injury in all the years of its athletic program. If the Court wants to consider whether "rampant" drug use justifies random drug testing, it won't reach that question on this record.

5. Issue not Likely to Recur

Of all the public school districts across the country -- and there must be hundreds, if not thousands, of them -- only one other district -- the one involved in *Schaill* -- has resorted to random drug testing to solve a perceived drug problem in its schools. At least, that is the only other drug testing program identified in the District's petition. Of course, the *Schaill* program has already passed through the courts, and so it is unlikely, as things now stand, that the issues presented in this case will appear in any other.

The reason why other school districts have rejected drug testing was noted earlier in this brief: Drug use is waning without drug testing. Apparently, our children are finally getting the

now-ubiquitous message: Drugs are harmful. They are learning to say no to drugs without the threat of having to prove they did by producing urine for inspection on demand. To be sure, there is still a drug problem in our schools -- not including, apparently, the schools in Vernonia, Oregon -- but it seems to be resolving without the need for such heavy-handed solutions as compulsory drug testing.[12]

---

[12] The District says that it adopted its drug problem only after "[h]aving tried all other reasonable alternatives." Pet. at 11. Hardly. The District did not try voluntary testing or testing on suspicion of wrongdoing, Tr. 56, two obviously less intrusive alternatives to compulsory testing.

The District did try various educational programs, including guest speakers who warned of the hazards of drugs. And these programs might have worked. The District has no way of knowing because it did not set up some method of monitoring the programs, such as tracking the number of disciplinary referrals before the program and after.

As noted earlier, some teachers perceived a improvement in student behavior after the drug testing policy took effect, which they attributed to the policy. But that improvement could also have been due to the educational programs. There simply is no way of knowing on this record.

The Court should decline to review this case without some evidence -- and there is none -- that the issues herein presented are likely to recur.

6. The Issue is not Ripe for Review

Even by the District's count, only two appellate courts have reviewed drug testing programs for school children -- the Ninth Circuit, in this case, and the Seventh Circuit, in *Schaill*. This Court would be well-advised to pass on the issue until more courts below have addressed it, if ever they do. That will ensure that the Court has the benefit of many viewpoints, and also demonstrate that the issue is important enough to warrant the Court's attention.

7. No Role for the Court to Play

This Court's review is discretionary, not obligatory. *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). Its mission, therefore, is not simply to correct lower court error or to give disappointed litigants one more chance to be heard. Rather, it is to announce new rules of law for the lower courts to apply.

In *Skinner* and *Von Raab*, discussed above, the Court established guidelines for random drug testing under the federal constitution: The government, the Court said, may test individuals without suspicion of wrongdoing if it has a compelling interest in testing which outweighs the individuals' expectations of privacy. The Ninth Circuit took these guidelines into account when it decided,

in this case, that the District's drug testing program violates the Oregon Constitution. 23 F.3d at 1523 et seq. (Pet. App. A at 40a). It concluded that, on this record, the District's professed interest in preventing athletic injuries does not outweigh the privacy interests of its students.

In its petition for writ of certiorari, the District does not challenge the *Skinner* and *Von Raab* guidelines. It does not ask the court to modify or overrule them. Indeed, it appears to be satisfied with how those cases were decided.[13] What the District

---

[13] As noted, *Skinner* and *Von Raab* approved random drug testing where the government has a compelling interest that outweighs the privacy interests of the people to be tested. What more does the District want -- a rule that any governmental interest, compelling or not, justifies drug testing? that the privacy interests of those to be tested don't matter at all? The District does not identify the what new rule of law, if any, it would have the Court adopt if it granted certiorari.

is *dissatisfied* with is the way the Ninth Circuit applied the *Skinner* and *Von Raab* guidelines to the peculiar facts of this case. It wants this Court to grant certiorari simply to apply the guidelines itself and (the District hopes) come to a different conclusion about the relative weights to be assigned to the interests of the District and its students. That request for a fact-based application of an established rule of law does not invoke the Court's rule-making authority and thus does not warrant the Court's attention.

8. Issue Already Decided

In a confusing section of its petition, the District asks the Court grant certiorari to consider an issue supposedly left open in *New Jersey v.*

TLO, 469 U.S. 325, 342 n. 8 (1985): whether public schools may search students without individualized suspicion of wrongdoing. But the Court has resolved that issue, indirectly if not directly. In *Skinner* and *Von Raab*, discussed *supra*, the Court held that a government agency may test its employees for illegal drug use, even if it has no reason to suspect that any individual employee is using illegal drugs, provided the agency has a compelling interest in testing, such as public safety. Those cases "reaffirmed the longstanding principle that neither a warrant nor probable cause, nor, indeed, individualized suspicion, is an indispensable component of reasonableness in every circumstance." *Von Raab*, 489 U.S. at 665, citing *TLO*, among other

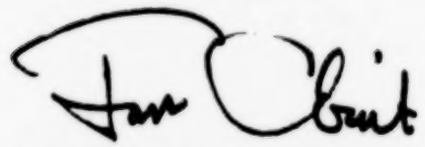
cases. Clearly, if adults can be searched without individualized suspicion of wrongdoing, so can schoolchildren. So that is not the issue in this case, as the District suggests. The issue, rather, is whether, in this particular case, the District's interest in testing its students outweighs their privacy interests. The Court of Appeals reviewed the evidence of drug use in the District's schools -- or, more accurately, lack of evidence -- and concluded that the District did not have a compelling interest in testing. This Court should not grant certiorari simply to re-weigh the evidence.

VI.

CONCLUSION

The Court should deny certiorari.

Respectfully submitted,



Thomas M. Christ

ACLU Foundation of
Oregon, Inc.
101 S.W. Main, Suite 2000
Portland, OR 97204
(503) 221-1011

Counsel of Record for
Respondents